

REPLY BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

16-49

LAWRENCE G. SKOTNIK

Appellant

v.

ROBERT A. MCDONALD
SECRETARY OF VETERANS AFFAIRS,

Appellee.

CHISHOLM CHISHOLM & KILPATRICK
DANA N. WEINER
One Turks Head Place, Suite 1100
Providence, Rhode Island 02903
(401) 331-6300
(401) 421-3185 Facsimile
Attorney for Appellant

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APPELLANT’S REPLY ARGUMENTS

I. The Board applied a higher standard than required by law to deny the Veteran’s service connection claim.

The Secretary asserts that the Veteran has not carried his burden because he has not pointed to evidence in the record indicating an association between his COPD and service. Sec. Br. at 7. The Secretary makes the same error as the Board by relying on the need for “credible scientific” evidence to support the Veteran’s claim. *Id.*; R-8. Both the Secretary and the Board failed to appreciate that lay evidence may meet the low threshold of *McLendon v. Nicholson*. See 20 Vet.App. 79, 81 (2006); see 38 U.S.C. § 5103A(d)(2) (2016).

Although the availability of competent medical evidence is relevant to 38 U.S.C. § 5103(A)(d)(2)(A), which deals with demonstrating a current disability, subsection (B) requires a “less-demanding [evidentiary] standard.” *Waters v. Shinseki*, 601 F.3d 1274, 1277 (Fed. Cir. 2010). If Mr. Skotnik possessed “competent evidence” of a causal connection, a medical examination would not be necessary because this information would satisfy the standard for an award of service connection. This prejudiced the Veteran because he may have been entitled to a medical examination or service connection but for the Board’s error. Remand is required for the Board to apply the proper standard in adjudicating the Veteran’s service connection claim.

II. The Board misinterpreted the law, failed to comply with the duty to assist, and provided inadequate reasons or bases for its decision.

The Board misinterpreted the law and failed to ensure that VA's duty to assist the Veteran was satisfied when it failed to obtain an examination to assess the etiology of Mr. Skotnik's COPD. The Secretary urges the Court to reject Mr. Skotnik's argument that the Board's reasons or bases for denying an examination were inadequate based on a lack of evidence "reflecting an 'indication' or 'association' between COPD and service." Sec. Br. at 7. He argues that the Veteran's reference to a medical article regarding the link between service and COPD was insufficient to trigger the duty to assist because Mr. Skotnik "never submitted the article to the Board nor offered any information about the date, publication source or author of the article." *Id.* Yet because the Veteran cited a medical authority, the Board's conclusion that the Veteran did not do so is inapposite to the facts of record. R-8; R-66-68.

Moreover, the Secretary fails to recognize that the Veteran's reference to a medical opinion equates to more than his own unsubstantiated lay opinion. The Veteran in this case did more than simply provide his own lay opinions to support his claim by citing to medical authority. *See* R-8; R-66-68. Thus, the Secretary's assertion that the Board's decision was adequate because it "addressed the material issues raised by [the Veteran] and explained its rejection of his lay opinion" is misguided, as his description of a report on herbicide exposure was a reference to medical literature and *not* an expression of his own opinion. *See* Sec. Br. at 9; R-66-68; *see also Comer v. Peake*,

552 F.3d 1362, 1369 (Fed. Cir. 2009) (“The VA disability compensation system is not meant to be a trap for the unwary, or a stratagem to deny compensation to a veteran who has a valid claim”).

The Board was required to assist Mr. Skotnik in developing the facts of his claim under 38 U.S.C. § 5107(a). Mr. Skotnik’s assertion that he discovered medical evidence supporting his claim is a reference beyond his lay knowledge. Although the Secretary argues that *Jandreau v. Nicholson* does not support the Veteran’s claim, the Veteran is competent to report medical evidence which he personally read, just as he is competent to relay information a doctor told him. *See* 492 F.3d 1372, 1377 (Fed. Cir. 2007); Sec. Br. at 8. The Board could not discount Mr. Skotnik’s statement without providing adequate reasons or bases as to why it considered his submission a sole discussion of lay opinion or, at minimum, without requesting the Veteran submit the article he discussed, if it found that the article was necessary to adjudicate the claim. *See Daves v. Nicholson*, 21 Vet.App. 46, 52 (2007) (“[d]ue process requires the Secretary to notify the [Veteran] prior to the adjudication of the claim of his ability to obtain evidence he has undertaken to obtain, so that the [Veteran] has a fair and reasonable opportunity to try and secure it or procure alternative evidence at a time when such information will be most useful to the adjudicator”).

At a minimum, remand is warranted as the Board failed to provide adequate reasons or bases for its determination that a VA examination was not warranted because the medical article Mr. Skotnik referenced did not constitute more than his

own opinions. R-8 (Mr. Sknotik is a lay person, whose opinions regarding the etiology of his COPS are not competent evidence, and he “does not cite to supporting medical opinion or clinical or medical treatise evidence” pertaining to his disability picture); *see Thompson v. Gober*, 14 Vet.App. 187, 188 (2000). The Secretary’s assertion that the Board’s decision was adequate because it “explained its rejection of [Mr. Skotnik’s] lay opinion” misses the mark because his statement was not his lay opinion, but a reference to medical authority. *See* R-66-68; *cf.* Sec. Br. at 9. Had the Board undertaken this discussion, it may have found that the Veteran was entitled to an award of service connection or an examination regarding the issue of nexus. Remand is required.

CONCLUSION

The Board erred when it applied a higher standard than required by law and failed to comply with the duty to assist the Veteran in denying service connection for COPD. This prejudiced Mr. Skotnik as he may have been entitled to service connection or an examination regarding nexus but for the Board’s errors.

Based on the foregoing reasons, as well as the arguments contained in Mr. Skotnik’s opening brief, the Court should vacate the Board’s decision and remand the appeal with instructions to readjudicate the issue of Mr. Skotnik’s entitlement to service connection for his COPD in accordance with the Court’s opinion.

Respectfully Submitted,

Lawrence G. Skotnik
By His Representatives,

/s/ Dana N. Weiner

Dana N. Weiner
Chisholm, Chisholm & Kilpatrick
One Turks Head Place, Suite 1100
Providence, RI 02903
(401) 331-6300
(401) 421-3185 Facsimile